IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 16, 2008

STATE OF TENNESSEE v. ROBERT ALLEN BYRD

Direct Appeal from the Criminal Court for Sullivan County
No. S52,455 R. Jerry Beck, Judge

No. E2008-01077-CCA-R3-CD - Filed September 4, 2009

Defendant, Robert Allen Byrd, entered a plea of guilty to theft of property valued at over $500.00, a Class E felony, and vandalism of property valued at less than $500.00, a Class A misdemeanor. Pursuant to the terms of the plea agreement, Defendant agreed to concurrent sentences of six years for the theft conviction as a Range III, persistent offender, and eleven months, twenty-nine days for the vandalism conviction, with the manner of service to be determined by the trial court. Following a sentencing hearing, the trial court denied Defendant's request for alternative sentencing and ordered Defendant to serve the agreed upon sentences in confinement. On appeal, Defendant argues that the trial court erred in denying his request for alternative sentencing. After a thorough review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Randall D. Fleming, Kingsport, Tennessee, for the appellant, Robert Allen Byrd.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Julie R. Canter, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

The transcript of the guilty plea submission hearing is not included in the record. See State v. Keen, 996 S.W.2d 842, 844 (Tenn. Crim. App. 1999) (observing that "a transcript of the guilty plea hearing is often (if not always) needed in order to conduct a proper review of the sentence imposed"). Therefore, the facts surrounding Defendant's convictions, which are minimal, may only be gleaned from the presentence report and the testimony presented at the sentencing hearing.

The official version of the facts contained in the presentence report provides as follows:

> On [July 21, 2006 at] approximately 1814 hours, [Defendant] cut the lock on the fence and entered onto the property of Thompson Metal Company at 288 Old Mountain View Rd., Bluff City, [Tennessee]. [Defendant] and Ronald J. Collins loaded copper condensors and [metal] bus bars into the bed of a white Dodge pick-up and fled the property. Sullivan County dispatch received a 911 call from a witness to the burglary. The witness provided a tag number (SYT137) and followed the suspects to a TVA power station on Mountain View Lane. [Defendant] and Ronald J. Collins parked the vehicle loaded with the copper condensors and metal bus bars and began walking down nearby railroad tracks. The witness remained in the area until Sullivan County Officer[s] Jason Hite [and] Mark Baird, and Bluff City [Police Department's] Sgt. Shannon Winters arrived. Officer Hite pursued the suspects on foot for a short distance. Sgt. Winters witnessed a Dodge van pulling from Mountain View Lane and made a traffic stop after the tag (SLQ711) did not match [the] information provided by dispatch. [Defendant] and Ronald J. Collins were identified as the suspects and taken into custody. [Defendant] was advised of his rights and signed a waiver confessing to the burglary, theft and vandalism.

The presentence report was introduced as an exhibit at the sentencing hearing without objection. According to the presentence report, Defendant was thirty-four years old at the time of the sentencing hearing. Defendant reported that he dropped out of school in the tenth grade but received his G.E.D. in 1993 while incarcerated at the Morgan County Regional Correctional Facility. Defendant stated in the presentence report that he began drinking alcohol when he was approximately fifteen years old but "slowed down" his consumption after he was convicted of driving under the influence in 1991. Defendant stated that he now drinks alcohol only "here and there." Defendant reported that he first smoked marijuana when he was thirteen years old but stated that he last used marijuana in 2007. Defendant said that he attended various substance abuse programs while incarcerated.

According to the presentence report, Defendant has a lengthy juvenile record which includes adjudications for burglary, theft of property, joyriding, assault, possession of weapons, and various driving violations. Since he turned eighteen in 1992, Defendant has accumulated seven convictions for burglary other than a habitation, three convictions for theft of property valued less than $500.00, and two convictions for vandalism. Defendant also has convictions for possession of burglary tools, evading arrest, criminal trespass, driving under the influence, leaving the scene of an accident, and driving with a suspended license. On two separate occasions, Defendant violated the terms of his parole and was returned to prison to finish serving his sentence.

At the sentencing hearing, Defendant testified that on July 21, 2006, he and Mr. Collins decided to steal scrap metal from Thompson Metal Services and sell the scrap metal to pay bills and purchase cocaine. Defendant said that he was not currently using cocaine. Defendant stated that he lived with his girlfriend, Ronda Kimberlin, and her three children. Defendant said that he supported

the family by buying and selling used vehicles which he would either repair for resale or sell as scrap metal. Defendant stated that his incarceration would be a "dramatic change" for his family, and he did not know whether his girlfriend could support the family by herself.

Defendant said that he helped various people in his community. Defendant said that he helped James Wilson by selling Mr. Wilson's used vehicles for scrap metal because Mr. Wilson was unable to work. Defendant also stated that he watched one of Vicky Holmes' children while Ms. Holmes visited her other child who was hospitalized for cancer treatments.

Defendant acknowledged that he had been sentenced to confinement for two of his convictions and that he had violated the terms of his parole for each sentence. Defendant admitted that he had a problem with drugs and "stealing." Defendant stated, however, that he had "worked hard" to change, and that he tried to meet all of his family's needs. Defendant apologized to the trial court for committing the offenses.

Ronda Amanda Kimberlin testified that she and Defendant had been seeing each other for approximately five years, and that she and her three children currently lived with Defendant. Ms. Kimberlin stated that Defendant worked every day at his recycling business. Ms. Kimberlin said that she would not be able to support the family by herself if Defendant was incarcerated. Ms. Kimberlin said that she was not aware that Defendant used cocaine although she suspected that he used marijuana. On cross-examination, Ms. Kimberlin acknowledged that Defendant telephoned her after he committed the theft and vandalism offenses and asked Ms. Kimberlin to pick him up because his truck had a flat tire.

Vicky Lynn Holmes, Ms. Kimberlin's sister, testified that her oldest son has brain cancer, and that her younger son lived with Defendant for three months following her oldest child's brain surgery. Ms. Holmes said that Defendant often helped her financially and also repaired her motor vehicle without charge. Ms. Holmes described Defendant as "a great person."

At the conclusion of the sentencing hearing, the trial court denied Defendant's request for alternative sentencing and ordered Defendant to serve his sentence in confinement.

II. Standard of Review

On appeal, Defendant challenges the trial court's denial of his request for alternative sentencing. He contends that some form of alternative sentencing was appropriate based on his family circumstances, the fact that he made all required court appearances while released on bond pending sentencing, and because the State did not oppose his request for alternative sentencing at the sentencing hearing.

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is improper. See T.C.A. § 40-35-401, Sentencing Comm'n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length,

range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. T.C.A. § 40-35-401(d). This presumption of correctness, however, "'is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.'" State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008) (quoting State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991)). "If, however, the trial court applies inappropriate mitigating and/or enhancement factors or otherwise fails to follow the Sentencing Act, the presumption of correctness fails," and our review is de novo. Carter, 254 S.W.3d at 345 (quoting State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992); State v. Pierce, 138 S.W.3d 820, 827 (Tenn. 2004)).

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant's own behalf about sentencing. T.C.A. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

III. Analysis

Effective June 7, 2005, our legislature amended Tennessee Code Annotated section 40-35-102(6) by deleting the statutory presumption that a defendant who is convicted of a Class C, D, or E felony, as a mitigated or standard offender, is a favorable candidate for alternative sentencing. Our sentencing law now provides that a defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. T.C.A. § 40-35-102(5), (6) (emphasis added). Additionally, a trial court is "not bound" by the advisory sentencing guidelines; rather it "shall consider" them. Id. § 40-35-102(6).

As of June 7, 2005, no longer is any defendant entitled to a presumption that he or she is a favorable candidate for probation. Carter, 254 S.W.3d at 347. As a Range III, persistent offender, Defendant is not considered a favorable candidate for alternative sentencing. See T.C.A. § 40-35-102(6). Nonetheless, Defendant remains eligible for an alternative sentence because his sentences were ten years or less and the offenses for which he was convicted are not specifically excluded by statute. T.C.A. §§ 40-35-102(6), -303(a).

In determining whether to deny alternative sentencing and impose a sentence of total confinement, the trial court must consider if:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103(1); see also Carter, 254 S.W.3d at 347. Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. T.C.A. § 40-35-103(2), (4). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. T.C.A. § 40-35-103(5); State v. Dowdy, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994).

As previously noted, a transcript of the guilty plea submission hearing was not included in the record and thus the nature and circumstances of the criminal conduct may be gleaned only from the brief "official version" contained in the presentence report and the testimony at the sentencing hearing. Defendant's failure to include the transcript of the guilty plea hearing in the record precludes this Court from conducting a full de novo review of the sentence under Tennessee Code Annotated section 40-35-210(b). See State v. Bennett, 798 S.W.2d 783, 789 (Tenn. Crim. App. 1990); State v. Shatha Litisser Jones, No. W2002-02697-CCA-R3-CD, 2003 WL 21644345, at *3 (Tenn. Crim. App. at Jackson, July 14, 2003), no perm. to appeal filed. Nonetheless, based on our review, we find no error in the trial court's sentencing determinations.

At the conclusion of the sentencing hearing, the trial court acknowledged that Defendant's status in the community and his willingness to help others were favorable factors. However, the trial court found that:

> the unfavorable factor is, is he's been through the mill so many times. He has numerous prior felony convictions, numerous prior misdemeanor convictions. He's been given opportunities for release in the community both from the prison and from the largess of the general sessions court. All these are set out in a multi-page conviction sheet.
>
> The unfavorable factors heavily outweigh any favorable factors. He's going to have to serve his sentence.

Based upon our review, we conclude that Defendant's lengthy history of criminal behavior and his previous inability to meet the conditions of parole support the trial court's denial of his request for alternative sentencing. Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgments of the trial court.

THOMAS T. WOODALL, JUDGE